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Paper 19

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OFFICE OF PETITIONS

ON PETITION

In re Application of  
McCafferty, et al.  
Application No. 09/417,479  
Filed: 13 October, 1999  
Attorney Docket No.: 213839-00011

This is a decision on the petition filed on 21 August, 2002, under 37 C.F.R. §1.137(b)<sup>1</sup> to revive the above-identified application.

The petition is **GRANTED**.

**BACKGROUND**

The record indicates that:

- the instant application was filed with a preliminary amendment on 13 October, 1999, under 35 U.S.C. §111 as a continuation of application Serial No. 08/484,893 (the '893 application-the national stage filing under 35 U.S.C. §371 of PCT/GB91/01134), which has since issued as Patent No. 6,172,197 (the '197 patent);
- following a restriction requirement on 26 June, 2000, the Examiner mailed on 28 December, 2000, a Notice for Petitioner to comply with the sequence listing rules set forth generally at 37 C.F.R. §§1.821-1.825;
- Petitioner challenged that requirement by way of a petition under 37 C.F.R. §§1.181 and 1.183 (which do not toll reply periods) filed (with a request and fee for a two- (2-) month

<sup>1</sup> Effective December 1, 1997, the provisions of 37 C.F.R. §1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 C.F.R. §1.137(b). a grantable petition filed under the provisions of 37 C.F.R. §1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 C.F.R. §1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. §1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee set forth in 37 C.F.R. §1.20(d)) required pursuant to 37 C.F.R. §1.137(c). (Emphasis supplied.)

extension of time) on 29 March, 2001, over a, 27 March, 2001, certificate of mail;<sup>2</sup>

- when Petitioner failed to file the required sequence listing within one month set forth or obtain an extension of time within which to do so, the instant application went abandoned after midnight 28 January, 2001;
- on 23 July, 2001, the Group Director denied the 29 March, 2001, petition;
- on 27 September, 2001, Petitioner filed a challenge to the decision of the Group Director, which was dismissed on 3 January, 2002;
- the instant petition to revive (with fee) was filed on 21 August, 2002, accompanied by the sequence listing previously at issue (the reply) and the statement of unintentional delay by Counsel.

The record (including the petitions filed on 29 March and 27 September, 2001, and 21 August, 2002) does not necessitate a finding that the delay between midnight 28 January, 2001, and 21 August, 2002, was not unintentional.

Rather, the Patent and Trademark Office is relying in this matter on Petitioner's (David Clough, Reg. No. 36,107) duty of candor and good faith when accepting Petitioner's representation that the delay in filing the response was unintentional.<sup>3</sup>

The instant application is being forwarded to Technology Center 1600 for further processing.

Telephone inquiries regarding this decision may be directed to the undersigned at (703) 305-9199.



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<sup>2</sup> Paper No. 11, styled "Response to Communication from Examiner and Petition under 37 C.F.R. §§1.181 and 1.183."

<sup>3</sup> See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing the statement required by 37 C.F.R. §1.137(b) to the Patent and Trademark Office).